

## Editorial note

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# BLAME IT ON BRUSSELS: EU LAW AND THE DISTRIBUTIVE EFFECTS OF GLOBALISATION\*\*\*

## 1 Introduction

Over recent years, or even decades, issues such as globalisation, technology, globalised wars, migration, or Brexit have accentuated two phenomena. The first is the distributive effects of law and of globalisation, and the second is the inadequacies in the political processes and outcomes where governments get rightly or wrongly blamed. These two phenomena inspired the theme of the 16th annual Jean Monnet seminar on advanced issues of EU law (Inter University Centre, Dubrovnik, April 2018) titled 'Blame It on Brussels: EU Law and the Distributive Effects of Globalisation'. This editorial note is based on the authors' keynote dialogue at the opening of the seminar and seeks to discuss the mentioned two phenomena, and consider what law and governments, and in particular the EU, can do about them.

## 2 Distributive effects of EU law and of globalisation

For the purposes of this paper, we can observe two main types of economic inequality. The first is global economic inequality between the population of different countries, and the second is economic inequality within a single country. In the EU context, there are in fact three per-

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spectives: inequality between EU citizens and third country nationals, inequality between the EU centre and its periphery, and inequality within a single Member State. The first will be discussed in the part below on global inequality (part 2.1), while the latter two will be considered together in the section on internal inequality (part 2.2).

### ***1.1 Global inequality***

Concerning global inequality, it is well known that there is a gap in the level of wealth of rich and poor countries. This is sometimes incorrectly seen as some natural phenomenon that results from thousands of years of history and that cannot be undone by regulation. We are not denying that the reasons for the global wealth gap are multifaceted and include diverse climate conditions, natural disasters, distant historic developments, etc. However, we want to highlight that contemporary governmental actions and laws, including those of the European Union, are not neutral to this.

For example, it is common knowledge that the European Union is a regional trading block where there are no internal customs duties between Member States, but that there are customs duties on goods coming from third countries. This set-up creates trade diversion, as a less competitive producer from within the block is favoured over a more competitive producer from outside the block.<sup>1</sup> Similarly, the EU's subsidies for agriculture are harmful for agricultural producers from third countries interested in exporting their agricultural products to the EU. Both features of EU regulation affect producers, particularly those from less developed countries which are not able to offer comparable subsidies themselves. It is true that the EU is not the only player with customs duties or subsidies that restrict external trade, and there are a number of reasons for keeping these measures in place (eg greater bargaining power in the World Trade Organization, social peace in the Member States, etc). However, one has to be mindful that EU measures affect global inequality. It is important to consider this not only when contemplating whether to remove some of the existing rules, but also when adopting new ones. For example, bilateral treaties such as the Transatlantic Trade and Investment Partnership (TTIP) between the EU and the United States could widen the world gap as they would create an even bigger and wealthier trading block leading to more trade diversion, hitting competitive producers from outside the block.

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<sup>1</sup> Some of the features of the EU internal market also contribute to the creation of trade, eg mutual recognition and minimum harmonisation, as they are also beneficial for third country goods.

In addition to being a regional trading block, the EU is a developed single market where EU citizens (*de iure* insiders) move freely within the EU, exercising a number of fundamental freedoms and citizenship rights, while those without EU citizenship (*de iure* outsiders) are subject to a different set of EU rules regulating various categories of third country nationals (TCN). This difference in treatment was accentuated by the migration crisis, and the EU makes choices on how to deal with that. This editorial note will not go into the details of legislative, political documents or cases on asylum seekers. Instead, let us briefly address two underlying assumptions behind the purpose of the EU and the purpose of law.

The classic narrative of European integration starts with Schuman's Declaration and explains how Schuman wanted to ensure future peace in Europe.<sup>2</sup> It expounds that his idea was that European states, particularly Germany and France, would start cooperating in the field of coal and steel, then in wider fields of economic integration, and that this economic cooperation would eventually spill over into other, non-economic areas, all the while making states so interconnected and dependent on one another that war between them would be inconceivable. However, this well-known narrative omits to mention an important part of Schuman's idea. Schuman does not speak of 'European peace', but instead his Declaration opens with the words '[w]orld peace'.<sup>3</sup> And many parts of the Declaration are really about the contribution that Europe should be making to the whole of human civilisation, and in particular to the development of Africa.<sup>4</sup> We are not trying to build a Scalia-type originalist argument so as to put forward that the Treaties must be interpreted in the way Europe's founding fathers envisaged them, but we do want to show that the idea has never been that of creating a fortress Europe, but of building global wellbeing and peace.

And we want to pair this idea with the purpose of law, and here we find Duncan Kennedy's critique of rights useful in this respect.<sup>5</sup> In simple terms, the critique of rights explains how rights are a formal concept that can prevent the delivery of justice. In a rights-based society, law and justice are different things. There is a formal distinction between those to whom the legal system recognises rights and those who do not have such recognised rights. This is true both of individual and collec-

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<sup>2</sup> Declaration by French Foreign Minister Robert Schuman, 9 May 1950.

<sup>3</sup> *ibid.*

<sup>4</sup> *ibid.*

<sup>5</sup> D Kennedy, 'The Critique of Rights in Critical Legal Studies' in W Brown and J Halley (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 214 <<http://duncankennedy.net/documents/The%20Critique%20of%20Rights%20in%20cls.pdf>> accessed 1 November 2018.

tive rights, as both are constructed in opposition to those not having those rights. In this rights-based system, individualism has precedence over altruism, and the absence of rights serves to explain injustice. In the context of EU law, it is understood that EU citizens have rights of a 'constitutional' nature to enter within the EU and move around freely, while third country nationals typically do not have such rights (unless they derive the rights from a certain family tie to an EU citizen<sup>6</sup>). Even some of the most fundamental rights cannot be of much help to outsiders because rights are, as Tushnet points out, typically constructed as a negative obligation.<sup>7</sup> For example, the right to life embodied in Article 2 of the Charter on Fundamental Rights,<sup>8</sup> in many national constitutions,<sup>9</sup> and in the European Convention on Human Rights,<sup>10</sup> prohibits the Member States and the EU from killing someone, but this right does not in any way create an obligation of the Member States or the EU to save a person drowning in the Mediterranean. According to Kennedy, a radical proposal can more easily be imagined if one puts aside the rights discourse.<sup>11</sup> So, thinking beyond rights is useful for making space for law and governments to improve global equality.

Let us also say that discussing only the issue of migrants or even the broader question of global inequality in isolation from the issue of internal inequality is a trap. Alexander Somek has argued that the progressives have embraced migration because

from their perspective, migrants seem to have assumed the role left vacant after the demise of the industrial proletariat... migrants count as the last class of history. Immigration is considered to be important, for it will give rise to a universally inclusive society.<sup>12</sup>

However, Somek points out that actually 'migration reconfirms bourgeois values. Migrants pursue their private self-interest'.<sup>13</sup> In his

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<sup>6</sup> Eg Case C-34/09 *Ruiz Zambrano* ECLI:EU:C:2011:124.

<sup>7</sup> Mark Tushnet, *Essay on Rights* (1984) 62 Texas Law Review, 1363, 1392.

<sup>8</sup> Charter of Fundamental Rights of the European Union [2007] OJ C303/01, Art 2.

<sup>9</sup> Eg Art 2(2) Grundgesetz für die Bundesrepublik Deutschland, 23.05.1949 – 'Jeder hat das Recht auf Leben und körperliche Unversehrtheit' [Art 2(2) of the German Basic Law, 23 May 1949 – 'Every person shall have the right to life and physical integrity'].

<sup>10</sup> European Convention on Human Rights, Art 2.

<sup>11</sup> See, eg, Duncan Kennedy, 'Legal Education as Training for Hierarchy', in D Kairys (ed), *The Politics of Law: A Progressive Critique* (3<sup>rd</sup> edn, Basic Books 1998) 62, where Kennedy states that the 'rights discourse is a trap', and that '[t]his framework is, in itself, a part of the problem rather than of the solution... [since it] makes it difficult even to conceptualize radical proposals' <[http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy\\_Politics%20of%20Law.pdf](http://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20Hierarchy_Politics%20of%20Law.pdf)> accessed 17 December 2018.

<sup>12</sup> Alexander Somek, 'Four Impious Points on Brexit' (2016) 17 German Law Journal 106.

<sup>13</sup> *ibid.*

view, ‘the connection between migration and social progress is at best a weak one’.<sup>14</sup> We cannot engage here with the whole of Somek’s argument, but we do agree that we have to internally build a more equal society in order to be able to help others on the other side of the border.

## **2.2 Internal inequality**

Within economic systems, there have always been and will always be insiders and outsiders – winners– and losers. However, we must note that today the difference between these economic classes is greater than it has been for some time. Within the EU Member States, income inequality nearly doubled on average from 1988 to 2016.<sup>15</sup> In the United States, income inequality is reaching levels that have not been seen since the 1920s – just before the Great Depression.<sup>16</sup>

According to Branko Milanović, formerly a lead economist at the World Bank, the biggest winners in the last three decades have been the very top of the income earners and the emerging global middle class.<sup>17</sup> This global middle class, between the 50th and 60th percentile of income earners, consists of some 270 million Chinese, 40 million Indians, 35 million Indonesians, and about 20 million people each from Brazil, Egypt and Mexico.<sup>18</sup> However, the middle classes of the high-income countries, those between the 80th and 95th percentiles, have experienced stagnant incomes.<sup>19</sup> This rift between the very rich and the middle class in high-income countries, combined with economic growth in lower-income countries, has caused many to point to globalisation to account for these shifts. Accordingly, recent political movements have capitalised on this sentiment. However, the income inequality that the middle classes of high-income countries are experiencing is not due solely to globalisation and cannot be cured with strict protectionist measures.

The last time economic inequality reached these levels there were also major technological advancements resulting in economic changes –

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<sup>14</sup> *ibid.*

<sup>15</sup> Zsolt Darvas, ‘This Is the State of Inequality in Europe’ (2018) World Economic Forum, 4 May 2018 <[www.weforum.org/agenda/2018/05/european-income-inequality-begins-to-fall-once-again](http://www.weforum.org/agenda/2018/05/european-income-inequality-begins-to-fall-once-again)> accessed 17 December 2018.

<sup>16</sup> Hannah Shaw, ‘Exploring Income Inequality, Part 5: The Concentration of Income and Wealth’ (*Center on Budget and Policy Priorities*, 2 December 2011) <[www.cbpp.org/blog/exploring-income-inequality-part-5-the-concentration-of-income-and-wealth](http://www.cbpp.org/blog/exploring-income-inequality-part-5-the-concentration-of-income-and-wealth)> accessed 17 December 2018.

<sup>17</sup> Branko Milanović, *Global Inequality: A New Approach for the Age of Globalization* (The Belknap Press of Harvard University Press 2018).

<sup>18</sup> *ibid.*

<sup>19</sup> *ibid.*

the industrial revolution.<sup>20</sup> Similar to today, technological advances of the time brought the global economy closer together, but they also brought machines, manufacturing and, most importantly, factories.<sup>21</sup> The result was industries that could produce more with fewer people. The technological changes meant a shift in what skills were favoured, as well as where geographically human manpower was needed.<sup>22</sup> People left their agricultural way of life and moved to cramped, poorly constructed homes near factories in the cities.<sup>23</sup> While some of the very poor may have benefited from this, it simultaneously reduced the wealth and importance of the *petite bourgeoisie*, the economic class that could pay for labour, but never controlled the means of production.<sup>24</sup> At the same time, the wealthy capital holders, the *haute bourgeoisie*, benefited significantly.<sup>25</sup>

While England was experiencing its most significant growth in GDP thanks to the industrial revolution, it simultaneously saw a spike in its Gini coefficient, an indicator of wealth inequality, from 0.4 in 1823 to 0.63 in 1871.<sup>26</sup> As of 2011, only four countries had greater income inequality than that of England in the 1870s.<sup>27</sup> The income inequality gap peaked in the 1920s.<sup>28</sup> These trends were common among other western economies that experienced the boon of the industrial revolution. In time, the world saw significant increases in taxation, government spending and regulation (in some cases, turning to isolationist policies) that aimed at and eventually narrowed the Gini coefficient in many western countries across the world by the early to mid-20th century.<sup>29</sup> The era was marked with social and political upheaval such as political revolutions, the Great Depression, and two world wars.

Similarly today, the technological advancements of the digital revolution have also been associated with massive shifts in the economy. Improvements in production, digitisation, automation, and other technolog-

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<sup>20</sup> Shaw (n 16).

<sup>21</sup> Eric Hopkins, *Industrialization and Society* (Routledge 2000) 2.

<sup>22</sup> Population Reference Bureau, 'Human Population: Urbanization', Archived 26 October 2009 at the Wayback Machine.

<sup>23</sup> *ibid.*

<sup>24</sup> Frank Bechhofer and Brian Elliott, 'Persistence and Change: The Petite Bourgeoisie in Industrial Society' (1976) 17(1) *European Journal of Sociology* / *Archives Européennes de Sociologie* / *Europäisches Archiv für Soziologie* 74.

<sup>25</sup> Shaw (n 16).

<sup>26</sup> 'As You Were' *The Economist* (London, 13 October 2012) <[www.economist.com/special-report/2012/10/13/as-you-were](http://www.economist.com/special-report/2012/10/13/as-you-were)> accessed 17 December 2018.

<sup>27</sup> Kevin Lincoln, 'The 39 Most Unequal Countries in the World' (*Business Insider*, 6 October 2011 <[www.businessinsider.com/most-unequal-countries-in-the-world-2011-10](http://www.businessinsider.com/most-unequal-countries-in-the-world-2011-10)>).

<sup>28</sup> Shaw (n 16)

<sup>29</sup> 'As You Were' (n 26).

ical advances have significantly improved productivity. For example, in the US, the manufacturing sector's productivity has nearly tripled since 1980, but over the same period employment in the sector plunged from 18.9 million jobs to 12.2 million.<sup>30</sup> The Boston Consulting Group reports that it costs barely \$8 an hour to use a robot for spot welding in the auto industry, compared to \$25 for a worker, and this gap will only widen as technology improves.<sup>31</sup> Due to digitisation, industries such as the media sector have brought the marginal cost – the cost added by producing one additional unit of a product or service – to nearly zero. A March 2018 study by the consultancy firm PwC stated, 'Due to automation and AI... 30% of jobs in Britain were potentially under threat'.<sup>32</sup> In wholesale and retailing – the sector that employs most people in the UK – 2.25 million jobs are at high risk of being lost.<sup>33</sup>

The recent acceleration of technological advancements has certainly brought the world economy closer, but it has also been a major driver in the economic shift we have seen in the last three decades. In his 2017 farewell speech, President Obama warned that the 'next wave of economic dislocations won't come from overseas. It will come from the relentless pace of automation that makes a lot of good middle-class jobs obsolete'.<sup>34</sup> These advancements mean that current and coming changes to the economy cannot be prevented by only protectionist policies.

To turn back to the EU context, there is firstly **inequality between EU Member States**, typically referred to as states of the centre and those of the periphery. Daniela Caruso<sup>35</sup> and Damjan Kukovec<sup>36</sup> explain how

<sup>30</sup> Mark Muro, 'Manufacturing Jobs Aren't Coming Back' (*MIT Technology Review*, 18 November 2016) <[www.technologyreview.com/s/602869/manufacturing-jobs-arent-coming-back/](http://www.technologyreview.com/s/602869/manufacturing-jobs-arent-coming-back/)> accessed 17 December 2018.

<sup>31</sup> Hal Sirkin and others, 'How Robots Will Redefine Competitiveness' (*Boston Consulting Group*, 23 September 2015) <[www.bcg.com/publications/2015/lean-manufacturing-innovation-robots-redefine-competitiveness.aspx](http://www.bcg.com/publications/2015/lean-manufacturing-innovation-robots-redefine-competitiveness.aspx)> accessed 17 December 2018.

<sup>32</sup> John Hawksworth, Richard Berriman and Saloni Goel, *Will Robots Really Steal Our Jobs? An International Analysis of the Potential Long Term Impact of Automation* (PricewaterhouseCoopers 2018) <[www.pwc.com/hu/hu/kiadvanyok/assets/pdf/impact\\_of\\_automation\\_on\\_jobs.pdf](http://www.pwc.com/hu/hu/kiadvanyok/assets/pdf/impact_of_automation_on_jobs.pdf)> accessed 17 December 2018.

<sup>33</sup> *ibid.*

<sup>34</sup> Barack Obama, 'President Obama's Farewell Address' (10 January 2017) The White House. President Barack Obama <<https://obamawhitehouse.archives.gov/farewell>> accessed 21 January 2017.

<sup>35</sup> Daniela Caruso, 'The "Justice Deficit" Debate in EU Private Law: New Directions' (23 August 2012) Boston University School of Law, Public Law Research Paper No 12-42, 7 <<http://ssrn.com/abstract=2135111>> or <<http://dx.doi.org/10.2139/ssrn.2135111>>. Here, Caruso took the example of the potential harmonisation of contract rules to argue how this would have regressive effects on some sellers, particularly those from new Member States.

<sup>36</sup> Damjan Kukovec, 'Economic Law, Inequality and Hidden Hierarchies on the EU Internal Market' (2016) 38(1) *Michigan Journal of International Law*; EUI Department of Law Re-



this is not just a consequence of the different starting positions at the moment of enlargement, but that EU law can actually accentuate the differences between Member States. Kukovec has written how EU internal market and competition law rules enable ‘goods dumping’ into the EU periphery which is ruining production in the periphery.<sup>37</sup> His thesis is nowadays even more relevant as European institutions are gradually discovering that companies from the EU’s centre are not successful in the periphery just because consumers from the periphery are interested in buying their high-quality goods. Instead, these companies use the centre’s market power and reputation to sell lower-quality goods to the periphery. A European parliament report shows that producers often use the same product name and product code to sell two different products – the lower quality one is sold in the periphery, and the higher quality one in the centre.<sup>38</sup> The EU first ignored this issue, thinking that there would be no problem provided that both types of products were safe for consumption. However, more recently there has been some awareness that this might be regulated as unfair business-to-consumer commercial practice<sup>39</sup> and as unfair competition<sup>40</sup> that affects all EU citizens, including when they travel to another Member State.<sup>41</sup>

The divide between the EU’s centre and periphery can also be seen in relation to the issue of the movement of workers and services. The divide is very clearly illustrated by the legislative history of the revision of the Posted Workers Directive.<sup>42</sup> To understand this divide, one has to go back to 2007 when the famous *Laval* case was decided. The case concerned the posting of workers from Latvia to Sweden to conduct construction work. The Laval company was blocked by Swedish trade unions from performing its work with a view to forcing Laval to sign a collective agreement and to pay its workers an hourly wage calculated on the basis

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search Paper No 7 <<http://ssrn.com/abstract=2748559>>; Damjan Kukovec, ‘Hierarchies as Law’ (2014) *Columbia Journal of European Law*, 131; Damjan Kukovec, ‘Law and the Periphery’ (2015) 21 *European Law Journal* 406.

<sup>37</sup> Eg in Kukovec, ‘Economic Law’ (n 36) 34.

<sup>38</sup> European Parliament, Report on Dual Quality of Products in the Single Market (2018/2008(INI)), A8-0267/2018, 19 July 2018.

<sup>39</sup> *ibid.*, eg, 4, 5.

<sup>40</sup> *ibid.*, 4, 20.

<sup>41</sup> *ibid.*, 15.

<sup>42</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1997] OJ L18/1. The Directive was amended by Directive (EU) 2018/957 of the European Parliament and of the Council of 28 June 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [2018] OJ L173/16. See another piece on this topic in this volume: Daniel Carter, ‘Equal Pay for Equal Work in the Same Place? Assessing the Revision to the Posted Workers Directive’ (2018) 14 *Croatian Yearbook of European Law and Policy*.



of statistics on wages for that part of Sweden.<sup>43</sup> The Court found that this constituted a breach of Laval's freedom to provide services. This meant that Laval was authorised to continue providing services in Sweden by posting Latvian workers whose rights were based on the Latvian, and not Swedish, collective agreement. This case was heavily criticised, primarily by scholars from the EU's centre,<sup>44</sup> since it was seen as going against any progressive agenda by undercutting the social standards in the wealthier countries and driving down labour costs to the detriment of workers. At the same time, the Court and scholars from the periphery<sup>45</sup> understood that this was the main way for the new Member States from Central and Eastern Europe to benefit from the single market. The single market was about using comparative advantages, and while the West had comparative advantages in many sectors of the production of goods and services, as well as more capital, the advantage of the East was cheaper labour. Without this cheaper labour, the Latvian company Laval would probably not have won the contract for the construction work in Sweden and would not have been able to export its services.

So almost a decade after this case, in 2016 the Commission proposed a Revision of the Posted Workers Directive, amending, *inter alia*, rules on the remuneration of posted workers so that under the new scheme the receiving Member State could set certain criteria for calculating the remuneration.<sup>46</sup> Of course, it would be wonderful for posted workers from the periphery if they could receive the remuneration of workers from the centre. However, the reality is that with that cost of labour, the company of the periphery would not be able to win the public procurement bid in the first place. This is why the national parliaments of the periphery objected to the amendment of the directive. They used the powers given to national parliaments by Protocol no 2 to the Treaties

<sup>43</sup> Case C-341/05 *Laval* ECLI:EU:C:2007:809, para 30.

<sup>44</sup> For example, for a critical comment of the case, see Ronnie Eklund, 'A Swedish Perspective on Laval' (2008) 29 *Comparative Labor Law & Policy Journal* 551. For more nuanced concerns on regulatory competition, see Simon Deakin, 'Regulatory Competition after Laval' (2007) 10 *Cambridge Yearbook of European Legal Studies* 581. See also Catherine Barnard, 'Viking and Laval: An Introduction' (2007) 10 *Cambridge Yearbook of European Legal Studies* 463, 492, where the Laval case is put in the context of a 'battle between the economic and the social dimension of the EU', while in fact it can be seen as a battle between the economy and social welfare (including the keeping of jobs) in Old v New Member States (although Barnard also rightly points out that posted workers of the new Member States are the winners).

<sup>45</sup> See eg Damjan Kukovec, 'A Critique of the Rhetoric of Common Interest in the EU Legal Discourse' (13 April 2012) available at <<https://ssrn.com/abstract=2178332>> or <<http://dx.doi.org/10.2139/ssrn.2178332>> accessed 17 December 2018.

<sup>46</sup> European Commission, Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services COM (2016) 128 final, 2016/0070 (COD).

on the application of the principles of subsidiarity and proportionality which allows national parliaments to issue reasoned opinions when they consider that a legislative proposal does not comply with the principle of subsidiarity.<sup>47</sup> According to Article 7 of the Protocol, when reasoned opinions issued by national parliaments represent at least one third of all the votes allocated to them, the Commission must review its proposal.<sup>48</sup> The example of the revision of the Posted Workers Directive is a unique case that showed the solidarity and common interest of the new Member States. Their national parliaments were very coordinated and they managed to gather 22 negative reasoned opinions, forcing the Commission to review the proposal.<sup>49</sup> The negative reasoned opinions came from nine Central and Eastern European Member States (Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia) and also from Denmark.<sup>50</sup> The subsidiarity control mechanism was an imperfect way of objecting to the revision of the Posted Workers Directive as that mechanism can only oblige the Commission to review its proposal. Indeed, the Commission reviewed it, and explained why it was maintaining it. The proposal was eventually adopted in June 2018.<sup>51</sup> This example clearly shows that the divide between the centre and the periphery does not exist in isolation from EU law, but that EU law can mitigate or aggravate it.

In addition to this inequality between citizens of different EU Member States, there is also ***inequality within a single Member State***, and again this is not unrelated to EU law. Marija Bartl has argued that the neo-liberal agenda has made the aim of establishment and functioning of the internal market incontestable, while competing aims and ideologies have caved in.<sup>52</sup> Those who were unable to find their place in the internal market (less educated workers, weaker consumers, the digitally inactive, etc) have become outsiders in the process of integration.<sup>53</sup>

The Brexit vote set off an alarm urging better public discussion on the benefits of the single market and its appropriate balance with other

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<sup>47</sup> Protocol No 2 on the Application of the Principles of Subsidiarity and Proportionality [2008] OJ C115/206, Art 6.

<sup>48</sup> *ibid*, Art 7.

<sup>49</sup> Communication from the Commission on the proposal for a Directive amending the Posting of Workers Directive, with regard to the principle of subsidiarity, in accordance with Protocol No 2 COM (2016) 505 final.

<sup>50</sup> *ibid*, 3.

<sup>51</sup> Directive 2018/957 (n 42).

<sup>52</sup> Marija Bartl, 'Internal Market Rationality: In the Way of Re-imagining the Future' (2018) 25 *European Law Journal* 99.

<sup>53</sup> *ibid*.

interests. Arguably, people who voted for Brexit thought EU trade and free movement were to blame for many of their problems. They believed that by blocking the inflow of other EU citizens, primarily those from Central and Eastern Europe, and by stopping the immigration of third country nationals, they could regain some benefits that once existed in a closed market. They, of course, did benefit from many of the features of the EU set-up, including cheaper goods and services, wider consumer choice, etc. However, many persons, especially those with poorer education, felt that they were not benefiting sufficiently as they could not offer their own labour on the EU market, and felt that they were even being deprived of work opportunities on the national market as others were coming to take their jobs. The problem of Brexit is that the EU was blamed for many things that are a consequence of technological advancements and globalisation, so leaving the EU will not solve the problem. The development of technology, including cheap and fast travel and the internet, has tightly connected the world. And the spread of English has made global communication so easy. Goods, services, capital and people move more easily across the globe than ever before. Brexit, or most types of protectionism, is a bad reaction to the fact that the world is interconnected, and will not address underlying problems,<sup>54</sup> such as job losses for certain categories of workers, and growing inequality.

Regardless of whether any inequality was caused or aggravated by the EU or whether it was caused by other developments, the question remains about **what the EU should be doing to correct it**. Roberto Unger has argued that the EU should turn itself upside down, ie that the market should be left to the states to experiment with, and the EU should focus on social rights, including education.<sup>55</sup> According to Unger, 'insiders' are those belonging to groups that can benefit from the current social structure, they work in 'the most advanced [and small] sectors of the economy... with innovation-friendly cooperation they have become responsible for an increasing part of the creation of new wealth'<sup>56</sup> while 'outsiders' represent 'the vast majority of people who... are excluded from [these sectors] as well as from the education which prepares people for them'.<sup>57</sup> The EU would have to guarantee high-quality lifelong critical, dialectical and cooperative education based on experimentation<sup>58</sup> en-

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<sup>54</sup> Miguel Poiarés Maduro, 'A falsa escolha e uma falsa solução' *Observador* (24 June 2016) <<http://observador.pt/opiniao/a-falsa-escolha-e-uma-falsa-solucao/>> accessed 1 November 2018.

<sup>55</sup> Roberto Mangabeira Unger, *Left Alternative* (Verso 2005) 92-93.

<sup>56</sup> *ibid.*, 89.

<sup>57</sup> *ibid.*

<sup>58</sup> *Ibid.*, 92-93.

abling the individual to be flexible on the job market and 'to participate in a form of production that increasingly becomes a practice of collective learning and pertinent innovation'. Similarly, Alexander Somek has argued that '[i]t is essential... that a European Union reverses its perverse federalist make-up. The current combination of free movement conflicting with nationally-conceived social welfare systems is a recipe for political disaster'.<sup>59</sup>

What comes to the mind of most scholars and practitioners working in the field of European law in reaction to these ideas of Bartl, Kukovec, Unger and Somek is that the EU has no competence for these radical changes, and that the Treaties are clear on the objective of creating an internal market. However, we would ask the reader to keep in mind that Treaty texts can never be entirely clear, and also that all treaties can be changed. The European Union needs imagination to think of better solutions. Furthermore, the multifaceted crisis which the EU is facing requires us to revisit even some of its basic assumptions.

### **3 Inadequacies in the political process and outcomes**

For a long period, the EU has been trying to tackle the attitude of 'blame it on Brussels' by doing more to inform its citizens about some positive developments in EU law and policy, both by making various documents available online as well as by making its activities understandable and accessible to citizens. However, it seems to us that there is nowadays a more globally present movement to 'blame it on the government'. This sentiment has been sweeping over many voting blocs across the globe and breeds populism. Those most affected by populist movements are those who are economic losers, as mentioned above, and who also feel they have little to no political power.

We have seen growing distrust of government generally. In the US, we have observed a rise in distrust of Washington. The last three presidential candidates have run as Washington outsiders. Whether or not it was true, Bush represented the simple American, Obama was young with a new hope, and Trump – possibly the pinnacle of this phenomenon – had never been in politics and seems to purposefully reject political norms. Even competitive, but ultimately unsuccessful, candidates of the last elections attempted to position themselves in the same way. McCain was a 'maverick', Bernie Sanders was an outsider with a different voice. However, in reality, both of these men were elected to the House of Representatives in 1982 and 1990 respectively and had each been serving in the Senate for several terms.

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<sup>59</sup> Somek (n 12) 107.

These elections show that Americans felt left out of the political discussion and decision-making process. A good and highly relevant example is the impressions of politics of Rust Belt voters.<sup>60</sup> The Rust Belt begins in central New York and traverses west through Pennsylvania, West Virginia, Ohio, Indiana, and the lower peninsula of Michigan, ending in northern Illinois, eastern Iowa, and southeastern Wisconsin. Voters from this area regularly play a significant role in presidential elections.

At the height of the industrial age, the Rust Belt's political and economic battle was between factory owners and union leaders. The collapse in the manufacturing industry and a significant increase in big business mergers have meant job losses but also the end of locally owned industries and local labour unions fighting those industries. According to Josh Pacewicz, an adjunct professor at Brown University, this 'left communities vulnerable to the whims of corporate subsidiaries and state and nonprofit grant-making agencies, which was often communities' only way to find discretionary funding'.<sup>61</sup> This means that the community leaders were constantly dealing with people outside the community. In 2008, a voter told Pacewicz:

We got a lot more retail [and cultural amenities, but] these things don't appeal to your average person. . . . We used to have factory jobs, but people had to settle for Walmart. We got businesses coming in with their money and saying, 'Your city wants it!' That's not democracy — that's communism.<sup>62</sup>

While the voter has incorrectly used the term communism perhaps because he has conflated that concept with authoritarian rule, he seems to be strongly opposing the government in determining what is best for the people of his town without seeking their opinion. This is the type of person that 'blames it on Washington'. Not only has he been left out economically, but he is also not involved in the political discourse. He feels politically disenfranchised and has experienced an economic downturn.

In the industrial revolution, the *petite bourgeoisie* experienced a similar phenomenon. The changing economy left the storekeepers, large

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<sup>60</sup> This was the topic of Donald Regan's keynote speech 'What Accounts for the Recent Rise of "Populism" in the US and the EU?' at the 15th annual Jean Monnet seminar on advanced issues of EU law (Inter University Centre, Dubrovnik, April 2017), and his ideas have fed into our own reasoning.

<sup>61</sup> Josh Pacewicz, 'Here's the Real Reason Rust Belt Cities and Towns Voted for Trump' *The Washington Post* (Washington DC, 20 December 2016) <[www.washingtonpost.com/news/monkey-cage/wp/2016/12/20/heres-the-real-reason-rust-belt-cities-and-towns-voted-for-trump/?noredirect=on&utm\\_term=.e19817cf4e3e](http://www.washingtonpost.com/news/monkey-cage/wp/2016/12/20/heres-the-real-reason-rust-belt-cities-and-towns-voted-for-trump/?noredirect=on&utm_term=.e19817cf4e3e)> accessed 17 December 2018.

<sup>62</sup> *ibid.*

farm owners, and small-scale merchants behind as people flocked to the cities. Many authors, such as RJB Bosworth<sup>63</sup> and Wilhelm Reich,<sup>64</sup> believe the economic change and the fall of the *petite bourgeoisie* made them disassociate from the *haute bourgeoisie*, feel powerless, leading to their support of populism and, in turn, of fascism.

There are people who are economic winners, but still feel like political outsiders. Just before the keynote talk on which this editorial note is based, one of us met a young woman named Julia. Julia is a 29-year-old Austrian program developer in the gaming industry.<sup>65</sup> Like a growing number of Europeans, Julia is sceptical of EU government institutions. 'They are going to do what they want', she said about EU politicians and bureaucrats. Julia personifies the idea of 'blame it on Brussels' which she says creates too many regulations – even though she is not sure what those regulations are. She knows that information is available, but it is not accessible in a way that makes it easy for her to understand. She feels the process as a whole is out of her control. In the Information Age, this feeling of disenfranchisement has increased. Citizens feel they should be able to access and interact with decision-makers thanks to the capabilities of the internet, but instead the internet is constantly showing them how little influence they have on governmental policies. When asked if she thought the Austrian parliament was more responsive, she stated she felt disconnected to that as well, but was much more optimistic. Even considering the difference in her opinions about the two governments, she was adamant that if given the choice she would vote against Austria leaving the EU.

Voter turnout is a crucial indicator of whether citizens feel their participation matters. According to the 2016 report by the International Institute for Democracy and Electoral Assistance on Voter Turnout Worldwide, there has been a 10% decline in voter turnout for European national parliamentary elections since 1980.<sup>66</sup> However there has been nearly a 20% decline in voter turnout for EU parliamentary elections.<sup>67</sup> In fact, the average voter turnout in EU national parliaments in the last election was 63%, while the EU parliamentary election had a voter turn-

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<sup>63</sup> RJB Bosworth, *Mussolini's Italy: Life Under the Fascist Dictatorship, 1915-1945* (Penguin Books 2007).

<sup>64</sup> Wilhelm Reich, *Mass Psychology of Fascism* (Aakar Books 2015).

<sup>65</sup> Interview with Julia by Sam Koplewicz (Dubrovnik, Croatia 21 April 2018).

<sup>66</sup> 'Voter Turnout Database' (*International Institute for Democracy and Electoral Assistance (IDEA)*) <[www.idea.int/data-tools/data/voter-turnout](http://www.idea.int/data-tools/data/voter-turnout)> accessed 17 December 2018.

<sup>67</sup> *ibid.*

out of 43%.<sup>68</sup> So while we see a general move away from engagement with governments, at the EU level this is more severe.

For decades, social scientists have stated that participatory decision-making processes make those affected by the decision feel better about the outcome. A study of tort litigants showed that satisfaction with decisions was less related to objective outcomes and costs than to perceptions of whether the procedure met the litigants' criteria of fairness – especially if they felt their story had been heard.<sup>69</sup> While Julia is not an economic loser – in fact she is in a growing industry – she feels like a political outsider who is not heard and in turn is unable to influence those who make decisions that govern her life. If she were an economic loser, imagine to what extent she might 'blame it on Brussels'!

Alexander Somek points out that the reaction of some liberals to growing populism is that '[t]he *people* are bearable only if mitigated by means of representation'.<sup>70</sup> And Somek rhetorically asks, 'Is this really the attitude with which you win the hearts and minds of disaffected ordinary folk?'<sup>71</sup> His, and my, answer is no. Not only is this idea of mitigating the power of these 'stupid' people illiberal, it plays into the very fear that motivates them. In this way, it is short sighted. As some of the more populist political leaders have found, these people should be embraced, not pushed away. It is a tool that can be used by both the right and the left. Theodore Roosevelt, a US President relatively to the left, the creator of the American social system, was renowned for speaking directly to the people in a simple way through his 'fireside chats'.

Therefore, as we look ahead at what is probably just the very beginning of the digital revolution and the resulting economic displacement wrapped in sentiments of disenfranchisement, we must not fight the people who have been attracted to populist trope, but rather work to create systems that make people adaptable to the new economic market realities and, more than that, make the political and legal decision-making process not only more transparent, but actually more accessible to all.

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<sup>68</sup> *ibid.*

<sup>69</sup> E Allan Lind and others, 'In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System (1990) 24(4) *Law & Society Review* 953.

<sup>70</sup> Somek (n 12) 105.

<sup>71</sup> *ibid.*



#### **4 Final remarks**

For the future of European integration, it is vital for the EU to address two questions. First, how much inequality can be attributed to the effects of law in the current set-up of the EU system (ie can Brussels or Luxembourg be blamed for it) or, instead, is inequality the result of different causes (eg globalisation, technical progress)? Second, what can the EU do to address inequalities resulting from EU integration or from other causes, and to make the positive sides of integration, including its contribution to equality, more visible to citizens? These questions are part of a global trend and many governments worldwide are facing similar discussions.